



OFFICE OF THE ATTORNEY GENERAL OF TEXAS
AUSTIN

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Honorable George H. Sheppard
Comptroller of Public Accounts
Austin, Texas

Opinion No. O-3776

Re: Will the gross receipts tax under Article 7060, as amended by H. B. 8, apply to sales of liquefied petroleum gas where made within the incorporated towns?

We are in receipt of your letter of July 17, 1941, in which you request the opinion of this department on the question contained therein as follows:

"Article 7060, R.S., 1925, and as amended by House Bill No. 8 of the Forty-seventh Legislature, provides in part as follows:

"Each individual, company, corporation, or association owning, operating, managing, or controlling any gas, electric light, electric power, or water works, or water and light plant, located within any incorporated town or city in this State, and used for local sale and distribution in said town or city, and charging for such gas, electric lights, electric power, or water, shall make quarterly, on the first day of January, April, July, and October of each year, a report to the Comptroller under oath of the individual, or of the president, treasurer, or superintendent of such company, or corporation, or association, showing the gross amount received from such business done in each such incorporated city or town within this State in the payment of charges for such gas, electric lights, electric power, or water for the quarter next preceding. Said individ-

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nal, company, corporation, or association, at the time of making said report for any such incorporated town or city of more than one thousand (1,000) inhabitants and less than two thousand, five hundred (2,500) inhabitants, according to the last Federal Census next preceding the filing of said report, shall pay to the Treasurer of this State an occupation tax for the quarter beginning on said date equal to forty-four hundredths (.44) of one (1) per cent of said gross receipts, as shown by said report; etc.'

"There is now sold to the consumer within the incorporated towns a liquefied petroleum gas. This gas, as a rule, is delivered to the consumer in liquid form and in order to retain its liquid state, it must be kept under high pressure but when released for the burner tip, it turns to a gas vapor. There are instances where a tank is installed on a lot from which a number of customers are taken care of by the gas being piped to the homes; in this case, as in the individual case, as soon as the pressure is released at the tank the gas vapor is formed and piped from house to house.

"Please tell me if the gross receipts tax, under the above article, will apply to such sales where made within the incorporated towns."

It may be seen that the article you quote in your letter contains two requirements before an individual becomes liable for the tax discussed therein. In the first place, in relation to the questions asked, the individual must operate within an incorporated city "any gas plant." Also the same must be used "for local sale and distribution of gas." The tax is based upon the gross amount received from the business done in the payment of charges for the gas. You have furnished us with the additional facts that the liquid gas in question is a component part or derivative of natural gas which is liquefied by pressure and temperature. In its natural state it is a gas. It is sold to the consumer

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either as a liquid or as a gas. Prior to its consumption it returns to its gaseous state. The first question arises as to whether or not the commodity you inquire about is gas within the meaning of the above quoted statute. You have advised us that the commodity is either a propane or a butane.

Propane is defined by Webster as follows:

"A heavy gaseous hydro-carbon, $\text{CH}_3 \text{CH}_2 \text{CH}_3$, of the paraffin series, occurring naturally dissolved in crude petroleum."

Butanes are defined by Webster as follows:

"Either of two isomeric, inflammable, gaseous hydrocarbons, $\text{C}_4 \text{H}_{10}$, of the methane series; * * * ."

Both of the above definitions recognize the commodity to be a gaseous substance. It is our understanding that the same is liquefied by pressure and temperature for purposes of transporting and handling. In this connection the Austin Court of Civil Appeals, in the case of *DALLAS GAS COMPANY v. STATE*, 261 S.W. 1063, writ of error refused by the Supreme Court, stated in connection with the taxing statute under consideration here, as follows:

"In its second proposition, based upon assignments 7 and 11, appellant contends that the term 'gas' as used in the statute means only artificial gas and does not include natural gas. We know of no rule of construction whereby such a conclusion could be reached. 'Any gas plant' certainly is broad enough and does include both natural and artificial gas. 4 Words and Phrases (First Series) p. 5044; 2 Words and Phrases (Second Series) p. 702; *Indianapolis v. Consumers Gas Trust Co.*, 144 Fed. 840, 75 C.C.A. 442." (Underlining ours)

Thus the Court of Civil Appeals indicates that the term "gas" is to be broadly construed as to any type of gas.

We believe that the language of the tax statute

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in question is broad enough to include butane and propane gas whether sold in liquid or gaseous state. The above commodities are commonly referred to as liquefied petroleum gas. Apparently, the Forty-fifth Legislature in 1937 considered liquefied petroleum gas as a type of gas. That Legislature passed House Bill No. 1017, Ch. 364, which reads, in part, as follows:

"Sec. 3. In addition to the duties and powers of the Commission hereinabove set forth, it is empowered and it shall be its duty to investigate the use of malodorants by persons, firms or corporations engaged in the business of handling, storing, selling or distributing natural and liquefied petroleum gases, including butane and other odorless gases, for private or commercial uses, or supplying the same by pipe lines or otherwise, to any public building or buildings or the general public, and the Commission is empowered to require such persons, firms or corporations to odorize such gas by the use of a malodorant agent of such character as to indicate by a distinctive odor the presence of gas; such malodorant agent so required to be used, however, shall be non-toxic and non-corrosive and not harmful to leather diaphragms in gas equipment, the method of its use and containers and equipment to be used in connection therewith to be under the direction of and as approved by the Railroad Commission of Texas; the Commission having full power and authority to prescribe such rules and regulations as in its wisdom may be deemed necessary to carry out the purposes of this Act. Nothing herein contained shall apply to gas transported out of the State of Texas." (Underlining ours).

Again in the emergency clause of the above quoted Act, the Legislature stated as follows:

"Sec. 5. The fact that in the past few weeks hundreds of lives have been lost from causes apparently due to escaping or accumulated gas explosions, and that numerous such

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accidents are constantly occurring by reason of the fact that butane liquefied petroleum gas is practically odorless and undetectable, creates an emergency * * * ." (Underscoring ours)

It is our opinion and answer to the first question that liquid petroleum gas is gas within the meaning of Article 7060 as amended by House Bill 8, Acts of the Forty-seventh Legislature, 1941.

In answer to the second question, we are advised that the individuals or corporations that sell this commodity transport the same either by means of pipe line in the city or by means of trucks carrying tanks of the same in its liquid state. The question arises as to whether the operation of such method of transportation puts the individual or corporation within the category of operating a "gas plant" as that term is used in Article 7060, supra. The Austin Court of Civil Appeals in the case of UTILITIES NATURAL GAS CO. v. STATE, 118 S.W. (2d) 297, in discussing the definition of the term "gas plant" within the meaning of Article 7060, stated as follows:

"The sole contention of appellant is that it is not a 'gas plant' within the meaning of the term as used in the statute, because it only owns and operates a single pipe line and sells gas to only one customer within the city of Victoria. We have reached the conclusion that when the statute is construed from its four corners and in the light of the purpose of its enactment, it cannot be so limited.

"It is true the statute designates the tax as 'an occupation tax', but it clearly appears from the language used that the tax is an excise laid on businesses 'owning, operating or managing or controlling any gas * * * plant * * * within any incorporated town or city * * * for local sale and distribution * * * of gas.' Group No. 1 Oil Corp. v. Sheppard, Tex. Civ. App., 89 S.W. (2d) 1081, error ref.; Trustees of Cook's Estate v. Sheppard, Tex. Civ. App., 89 S.W. (2d) 1026, error ref., affirmed by the

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Supreme Court of the United States, Barwise v. Sheppard, 299 U.S. 33, 57 S. Ct. 70, 81 L. Ed. 23. It also clearly appears from the language of the statute that the legislature intended to tax the business undertaking or enterprise and not the method or manner of conducting it, because the statute does not undertake to define in any manner the term 'gas plant' as indicative of the business sought to be taxed. Peerless Carbon Black Co. v. Sheppard, Tex. Civ. App., 113 S.W. (2d) 996, error ref. In consequence, the term 'gas plant' as used in the statute includes any method or manner whereby the business of selling and distributing gas is carried on within any incorporated city or town. Dallas Gas Co. v. State, Tex. Civ. App., 251 S.W. 1063, error ref. (Underseoring ours).

"In 3 Bouv. Law Dict., Rawle's Third Revision, p. 2597, the word or term 'plant' is defined as being 'the furnitures and tools necessary to carry on any trade or mechanical business.' A highly complex or elaborate system is not necessary, but the most simply system whereby the business of selling and distributing gas to local trade within any incorporated city or town will suffice under the taxing statute as a gas plant. Under this rule the pipe line system and apparatus of appellant located in the city of Victoria, whereby it sells and delivers gas to local trade, constitutes its gas plant by and through which it carries on its gas business in said city, and such is the business intended to be taxed by the statute.

" * * * .

"As already held the tax is not imposed on the plant, or method or manner of conducting the gas business, but is laid on businesses engaged in selling and distributing or delivering gas to local trade within any incorporated town or city." (Underseoring ours).

The court further stated that the sale by the

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Utilities Natural Gas Company by pipe line to only one customer in the city of Victoria amounted to a distribution of the gas in said city within the meaning of the tax statute. The Commission of Appeals reversed the Austin Court of Civil Appeals in an opinion reported in 128 S.W. (2d) 1153. The Commission did not quarrel with the definition of "gas plant" stated by the Austin Court of Civil Appeals, but the Commission of Appeals held that the sale to a single customer in the city of Victoria did not amount to "use for local sale and distribution" of gas in the city as the statute contemplated. The Commission of Appeals concludes as follows:

"But considered in the light of the provisions of the statute, as a whole, we have no doubt that the simple fact that a delivery of gas is made in the city, by means of said pipe line to a single customer and to nobody else, was not intended by the Legislature to be comprehended by the term 'distribution' as used. This term as used does not mean the transfer of the possession of gas, by means of the pipe line, to a single purchaser where such purchaser is the only customer to whom the gas company sells gas in the city. It means the transfer of possession of gas to various individuals or concerns in the city. Any other construction of the term would, in our opinion, involve a departure from the legislative intent. Since, therefore, the use of 'gas-works,' in a city or town in this State, for the distribution of gas in said city or town is, by statute, made an essential characteristic of the business taxed, it follows that the business in which the plaintiff in error is engaged, as disclosed by the undisputed facts, is not subject to the tax which this statute provides."

It is the opinion of this department in line with the above quoted cases that any individual or corporation selling or distributing liquid petroleum gas to more than one consumer in any incorporated city within the population brackets stated in Article 7060, as amended by

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House Bill 8, Acts of the Forty-seventh Legislature, 1941, would be subject to the gross receipts tax levied therein.

APPROVED AUG 1, 1941

James R. Allen
FIRST ASSISTANT
ATTORNEY GENERAL

Yours very truly

ATTORNEY GENERAL OF TEXAS

By *Billy Goldberg*
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Assistant

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